IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In re the Marriage of:	)	**No. 21808-2-III**
	)	**(consolidated with**
MARTA CHILTON TURKSEL,	)	**No. 24012-6-III)**
	)	
Respondent,	)	
	)	**Division Three**
and	)	
	)	
BRUCE EDWARD BERNHARDT,	)	
	)	**UNPUBLISHED OPINION**
Appellant.	)	
	)	

SWEENEY, C.J.—Virtually all decisions in a dissolution action, from division of property, to spousal or child support, to visitation, are vested in the sound discretion of the trial judge. *In re Marriage of McDole*, 122 Wn.2d 604, 611, 859 P.2d 1239 (1993); *In re Marriage of Foley*, 84 Wn. App. 839, 842-43, 930 P.2d 929 (1997); *Pollock v. Pollock*, 7 Wn. App. 394, 399, 407, 499 P.2d 231 (1972). And we are not wont to revisit them because of the emotional and financial toll exacted from the parties by protracted litigation. *In re Marriage of Landry*, 103 Wn.2d 807, 809, 699 P.2d 214 (1985). We are, then, very deferential to a trial judge's findings of fact, conclusions of law, and judgment.

But the legislature has set out specific statutory requirements and criteria for some of the court's decisions; for example, limiting support (RCW 26.19.011(1), .020, .080(4)) and tying some obligations to a percentage of the support and contributions to a parent's income (RCW 29.19.065(1)). Some of these criteria were not followed here and so we remand for further fact finding.

FACTS

The court dissolved the marriage of Bruce Edward Bernhardt and Marta Chilton Turksel in 1993. They had three children: Tyson (born July 12, 1983), Kellan (born March 16, 1987), and Hillary (born April 15, 1989). The court entered a final parenting plan and a final order for child support on December 29, 1993.

Mr. Bernhardt moved to modify the parenting plan on March 23, 2000. He also requested that the court reduce his child support. Ms. Turksel filed a counterclaim and requested that the court modify the child support "in conjunction with the proposed parenting plan" and child support worksheets. Clerk's Papers (CP) at 1169.

The court held a trial on March 15, 2002. It amended the parenting plan and amended the child support order. It ordered Mr. Bernhardt to pay $1,819.54 per month in child support for his two minor children. He had previously been ordered to pay $1,080 (for three minor children). The court also ordered Mr. Bernhardt to pay: 79 percent of the parents' share of the postsecondary educational expenses for his oldest son (both

parents' share equals two-thirds of the total postsecondary educational expenses), 79 percent of the extraordinary health care expenses, and long distance transportation expenses to transport the two minor children (between his home in Grangeville, Idaho, and SeaTac airport).

Mr. Bernhardt moved for reconsideration of the final order of child support on October 1, 2002. Ms. Turksel moved to have him found in contempt for failure to pay previously ordered child support. She also wanted a mandatory wage assignment of Mr. Bernhardt's wages to pay the support obligations.

The court denied Mr. Bernhardt's motion for reconsideration. It held Mr. Bernhardt in contempt for failing to pay postsecondary educational expenses and extraordinary health care expenses. And it granted Ms. Turksel's request for a wage assignment. Mr. Bernhardt appealed on February 24, 2003.

Ms. Turksel moved in superior court for attorney fees *for the appeal* on October 25, 2004. She did not file a financial declaration. The court "denied [her motion] without prejudice and [ordered that] she may renew the motion with a proper showing regarding her financial need." CP at 1949; Report of Proceedings (RP) (Nov. 15, 2004) at 7.

Ms. Turksel renewed her motion for attorney fees (for the appeal) in the superior court on January 3, 2005. The court ordered Mr. Bernhardt to pay $8,000 of Ms.

Turksel's attorney fees (on appeal) for fees "incurred to date." CP at 2068.

Mr. Bernhardt filed another notice of appeal on March 17, 2005. We consolidated this appeal with his earlier appeal (appeal of February 24, 2003).

DISCUSSION

Parenting Plan Timely Appeal

A party must file a notice of appeal within 30 days after an appealable order is entered. RAP 5.2(a).

The final amended parenting plan here was entered on September 13, 2002. Mr. Bernhardt appealed that plan by notice dated February 24, 2003. The appeal was then beyond the 30-day time limit imposed by the rule. RAP 5.2(a). And we do not, therefore, have jurisdiction to entertain his appeal. *In re Marriage of Maxfield*, 47 Wn. App. 699, 702, 737 P.2d 671 (1987).

We have nonetheless reviewed Mr. Bernhardt's challenge to the court's findings of fact (in the parenting plan) and conclude that they are amply supported by the record, including the various limitations imposed by the court. *In re Marriage of Rideout*, 110 Wn. App. 370, 377, 40 P.3d 1192 (2002), *aff'd*, 150 Wn.2d 337, 77 P.3d 1174 (2003).

Child Support Postsecondary Education

We review a trial court's modification of an order for child support for an abuse of discretion. *In re Marriage of Rusch*, 124 Wn. App. 226, 231, 98 P.3d 1216 (2004). A

court abuses its discretion if its decision is "manifestly unreasonable or based on untenable grounds or reasons," or if the court's decision is contrary to law. *In re Marriage of Daubert*, 124 Wn. App. 483, 490, 99 P.3d 401 (2004).

A child support order may be modified to include an award for postsecondary educational support where there has been a "substantial change of circumstances." RCW 26.09.170(1); RCW 26.19.090. The court must determine the "necessity for and the reasonableness of all amounts" ordered. RCW 26.19.080(4); *Daubert*, 124 Wn. App. at 494.

A court must consider several factors before ordering postsecondary educational support. RCW 26.19.090(2). These factors include the "[a]ge of the child; the child's needs; the expectations of the parties for their children when the parents were together; the child's prospects, desires, aptitudes, abilities or disabilities; the nature of the postsecondary education sought; and the parents' level of education, standard of living, and current and future resources." *Id.* The court is also required to consider "the amount and type of support that the child would have been afforded if the parents had stayed together." *Id.* It must enter findings to support its determination. RCW 26.19.035(2); *Daubert*, 124 Wn. App. at 494-96.

Mr. Bernhardt argues that the court erred as a matter of law when it awarded postsecondary educational support. He argues that Ms. Turksel failed to show there was

a substantial change of circumstances or that a statutory exemption applied. Ms. Turksel counters that the parties were subject to a statutory exemption (to the substantial change of circumstances requirement) since the oldest child was still in high school and support was needed beyond his 18th birthday. But this exemption requires "a finding that there is a need to extend support beyond the eighteenth birthday *to complete high school*." RCW 26.09.170(5)(c) (emphasis added). The parties are not arguing over support needed to complete high school. The issue here is postsecondary educational support.

Mr. Bernhardt further argues that the court failed to enter findings of fact required by RCW 26.19.090(2) (factors for postsecondary educational support). Ms. Turksel responds that Mr. Bernhardt agreed to contribute to postsecondary educational expenses and so findings were not necessary.

And the court did award postsecondary educational support without finding that the award was "necessary and reasonable." *See* RCW 26.19.035(2), .080(4), .090(2); *Daubert*, 124 Wn. App. at 494-96. But it did so because Mr. Bernhardt agreed that the oldest child needed some form of postsecondary educational support. RP (March 15, 2002) at 33-35, 132. And therefore we cannot find fault with the court's or counsel's failure to go through the exercise of entering findings supporting the necessity for the award. We conclude then there is no error.

Mr. Bernhardt's Percentage of Postsecondary Educational Support and Extraordinary Health Care Expenses

Extraordinary health care expenses "shall be shared by the parents in the same proportion as the basic child support obligation." RCW 26.19.080(2). Postsecondary educational expenses are apportioned in the same manner. RCW 26.19.001, .090; *Daubert*, 124 Wn. App. at 505. The allocation of these expenses is not, then, a matter within the court's discretion. *Daubert*, 124 Wn. App. at 505; *In re Marriage of Scanlon*, 109 Wn. App. 167, 181, 34 P.3d 877 (2001).

Here, the court calculated the parties' combined net income. It then calculated Mr. Bernhardt's contribution at .786. The court used this number to set Mr. Bernhardt's proportional share of his basic child support obligation. It rounded this number to .79 and applied that percentage to Mr. Bernhardt's additional child support obligations. So it ordered Mr. Bernhardt to pay 79 percent of the extraordinary health care expenses and 79 percent of the parents' share of the oldest child's postsecondary educational support expenses. The parents' total share of the postsecondary educational support expenses is two-thirds of the actual cost.

Mr. Bernhardt argues that the court erred when it ordered him to pay a higher share of these expenses. The court has no discretion in allocating these expenses between the parties. RCW 26.19.080(2); *Daubert*, 124 Wn. App. at 505; *Scanlon*, 109 Wn. App. at 181. It must allocate the expenses based on their basic child support obligation. RCW

26.19.080(2); *Daubert*, 124 Wn. App. at 505. The court, then, correctly calculated Mr. Bernhardt's share of these expenses based on his basic child support obligation.

Basic Child Support Obligation – Standard Support Guidelines

Mr. Bernhardt next argues that the court erred when it deviated from the child support guidelines and ordered support in excess of the statutory maximum without entering comprehensive findings of fact to support the deviation. Ms. Turksel responds that RCW 26.19.020 does not require "comprehensive" findings. It instead requires findings of a comprehensive examination. And she says the court did this. Moreover, she argues that the court did not "deviate" from the support guidelines.

Basic child support obligations are derived from an economic table. RCW 26.19.011(1), .020. The values in the table are based on the parents' combined monthly net income, the number of children, and the children's ages. RCW 26.19.020. The table is capped at a combined monthly net income of $7,000. *Id.* The court may, however, exceed the maximum basic child support obligation set out in these tables if the parents' combined monthly net income exceeds $7,000. RCW 26.19.020, .065(3). But it must support the decision with written findings showing that the support is both necessary and reasonable. *Daubert*, 124 Wn. App. at 494-99; *see* RCW 26.19.080(4). "[T]he trial court must [also] consider whether the additional amount to be paid is 'commensurate with the parents' income, resources[,] and standard of living,' in light of the totality of the

financial circumstances." *Daubert*, 124 Wn. App. at 494-95 (quoting RCW 26.19.001). It cannot award child support exceeding the advisory number if the children do not have a need for child support exceeding the statutory maximum. *Rusch*, 124 Wn. App. at 233.

The court here found that the parties had a combined monthly net income of $7,996.48. It found that the standard calculation of child support, based on the statutory maximum in the economic table, was $1,569.64. CP at 1304,[1] 1315-17. It nonetheless ordered Mr. Bernhardt to pay $1,819.54 per month in child support for his two minor children. This amount does not include Mr. Bernhardt's share of the postsecondary educational expenses, his share of the extraordinary health care expenses, or long distance transportation expenses.

The court supported the increased child support with a finding that: "Court ordered deviation taking into account the parties expenses and the higher income of the parents takes the parties 'joint income' off the charts of the child support guidelines and takes into account that the obligor parent [Mr. Bernhardt] will be paying 79% of [the oldest child's] college expenses." *Id.* at 1305. The college expenses are not, however, included in this amount. The court instead ordered Mr. Bernhardt to pay 79 percent of the parents' share of the postsecondary educational expenses "directly to the institution or to the

[1] The final order of child support shows that the standard calculation of child support is $1,569.54. The child support worksheets show the value as $1,569.64. The number on the worksheet appears to be the correct value.

child." *Id.* at 1309.

These findings are then inadequate. *Daubert*, 124 Wn. App. at 499. The question of fact is "the necessity for and the reasonableness of" a child support obligation in excess of the maximum in the economic table. RCW 26.19.080(4); *Daubert*, 124 Wn. App. at 495-99. And the finding does not address the parents' standard of living. *Daubert*, 124 Wn. App. at 494-96, 499. "The mere ability of either or both of the parents to pay more . . . is not enough to justify ordering more support." *Id.* at 498. We then remand for the necessary factual findings and any decision they may support. *Id.* at 499.

Total Child Support Obligation Violates RCW 26.19.065(1)

A child support order must be supported by findings of fact. RCW 26.19.035(2). And a parent's "*total* child support obligation" may not exceed 45 percent of his or her net income unless good cause is shown. RCW 26.19.065(1) (emphasis added). A parent's "total child support obligation" includes additional support payments in excess of the "basic child support obligation." RCW 26.19.011(1), .065(1); *In re Marriage of McCausland*, 129 Wn. App. 390, 412, 118 P.3d 944 (2005), *review granted*, 157 Wn.2d 1008 (2006); *Daubert*, 124 Wn. App. at 502. Additional support payments include extraordinary health care expenses, long distance transportation costs, and postsecondary education support. RCW 26.19.080(2), (3); RCW 26.19.090; *Daubert*, 124 Wn. App. at 502, 505.

If "a parent is ordered to pay particular expenses for the children[, in excess of the basic child support obligation], the record must include what those costs are generally." *McCausland*, 129 Wn. App. at 412. "[T]he court must consider each parent's ability to share those expenses in light of their economic circumstances and in light of their total child support obligation." *Id.* (citing RCW 26.19.001, .065(1); *Daubert*, 124 Wn. App. at 495).

Mr. Bernhardt argues that his *total* child support obligation exceeds the statutory limit of 45 percent of his net income. Mr. Bernhardt's monthly net income is $6,283.85. CP at 1303. Forty-five percent of his monthly net income is $2,827.73. *See id.*

The court here ordered Mr. Bernhardt to pay $1,819.54 per month in basic child support. It also ordered Mr. Bernhardt to pay long distance transportation expenses from his home in Grangeville, Idaho to SeaTac airport; 79 percent of extraordinary health care expenses; and 79 percent of the parents' share of the postsecondary educational support expenses for the oldest child. *Id.* at 1310, 1312, 1308-09.

Mr. Bernhardt's support obligation includes the following amounts which accrued in the four months after the child support order was entered: "$1,475.48" for extra-ordinary health care expenses and "$7,729.12" for (annual) postsecondary educational support. *Id.* at 1502-03. The approximate additional monthly obligation represented by these expenses is $368.87 for extraordinary health care expenses ($1,475.48 divided by

4) and $644.09 for postsecondary educational support ($7,729.12 divided by 12). *See id.* We could not locate a current value for transportation expenses in this record. Ms. Turksel's exhibit 17 details the transportation expenses as of January 19, 2002. She stated that the actual roundtrip airfare from Lewiston to SeaTac was $226 per person. She also stated that Mr. Bernhardt's roundtrip mileage expense between Grangeville and Lewiston was $92.69.

The sum of the extraordinary health care and postsecondary educational expenses plus Mr. Bernhardt's basic child support amount equals $2,832.50. This is greater (albeit modestly) than 45 percent of Mr. Bernhardt's monthly net income ($2,827.73). And these expenses do not include an amount paid for long distance transportation.

Mr. Bernhardt argued in a motion for reconsideration that the court ordered an excessive amount of child support ("approximately 50% of his monthly net income"). CP at 1351. The court found that Mr. Bernhardt's child support obligation was "closer to 29%" of his income. CP at 1496. But it did not consider any of the additional expenses that Mr. Bernhardt was required to pay (beyond the basic transfer payment of $1,819.54):

> The Court finds [Mr. Bernhardt's] argument that he is required unfairly to pay "50% of his net earnings" for child support disingenuous. . . . The proportion . . . would be closer to 29%: $1,819.54 (the child support amount) divided by $6,283.85 (the amount he shows in Mr. Mitchell's declaration in the motion for reconsideration) equals .2896.

Id.

The question is whether Mr. Bernhardt's "total child support obligation" exceeds 45 percent of his net income. RCW 26.19.065(1). It does. And the court did not enter the necessary findings of fact. *Daubert*, 124 Wn. App. at 490. We remand for a calculation of Mr. Bernhardt's total child support obligation in accordance with RCW 26.19.065(1). *See McCausland*, 129 Wn. App. at 412. And if Mr. Bernhardt's obligation remains in excess of 45 percent, the court must support the conclusion good cause with the necessary findings of fact. RCW 26.19.065(1).

Ms. Turksel Voluntarily Underemployed

A "court shall impute income to a parent when the parent is . . . voluntarily underemployed." RCW 26.19.071(6). "The court shall determine whether the parent is voluntarily underemployed . . . based upon that parent's work history, education, health, and age, or any other relevant factors." *Id.*

Mr. Bernhardt argues that the court erred when it overturned its previous finding that Ms. Turksel was voluntarily underemployed. The court found her to be voluntarily underemployed in a January 24, 2001 order granting attorney fees. CP at 537, 524, 533.

The court considered Ms. Turksel's employment situation a number of times. *Id.* at 742, 744, 1318; RP (May 8, 2002) at 22. It addressed her employment situation in a temporary order of child support entered on August 10, 2001. CP at 742, 622. It concluded that Ms. Turksel was not *voluntarily* underemployed: "The income of the

obligee is not imputed because the obligee has diligently sought full-time work and has been unable to obtain it." *Id.* at 744.

Ms. Turksel then presented evidence of new employment at trial on March 15, 2002. RP (Mar. 15, 2002) at 8; Exs. 17, 19, 54. She obtained new employment on August 15, 2001. Ex. 17 at 4. The court found: "I do not find that Ms. Turksel[] is voluntarily underemployed. I think she's in her field in a job that's about as good as she can get, and it has possibilities for advancement that will be beneficial for everybody's income down the . . . line." RP (May 8, 2002) at 22. It also stated in its final order of child support that Ms. Turksel's income is based on her 2000 tax return and is "past income and is not predictive of future income." CP at 1318.

The court's conclusion, then, that Ms. Turksel is not voluntarily underemployed is well supported by its finding and the record.

Wage Assignment

A party may move for a mandatory wage assignment order based on a child support order that allows for an immediate wage withholding action. RCW 26.18.070(1)(a). A party may also move for a wage assignment order if the other party is "[m]ore than fifteen days past due in child support . . . payments in an amount equal to or greater than the obligation payable for one month." RCW 26.18.070(1)(b). A court shall issue a wage assignment order upon receipt of a motion that complies with RCW

26.18.070. RCW 26.18.080(1).

Mr. Bernhardt argues that the court erred when it entered the wage assignment order since he was not behind in his child support payments. He does not, however, address the immediate wage withholding provision in the final order of child support, entered September 13, 2002. CP at 1306. The order allows this:

> Withholding action may be taken against wages, earnings, assets, or benefits, and liens enforced against real and personal property under the child support statutes of this or any other state, without further notice to the obligor parent at any time after entry of this order unless an alternative provision is made below.

Id. The court did not provide an alternative provision, and instead clarified the statement: "If the court orders immediate wage withholding in a case where Division of Child Support does not provide support enforcement services, a mandatory wage assignment under Chap. 26.18 RCW must be entered and support payments must be made to the Support Registry." *Id.*

The wage assignment order was appropriate whether or not Mr. Bernhardt was behind in his child support payments. RCW 26.18.070, .080.

Contempt of Court – Postsecondary Educational Support Expenses and Extraordinary Health Care Costs

We review a trial court's contempt order for abuse of discretion. *Moreman v. Butcher*, 126 Wn.2d 36, 40, 891 P.2d 725 (1995). The court must enter appropriate

findings of fact to support the order. *In re Marriage of James*, 79 Wn. App. 436, 440, 903 P.2d 470 (1995).

A party may be held in contempt for the failure to comply with a child support order. RCW 26.18.050(1). "Contempt" is an intentional disobedience of a lawful court order. RCW 7.21.010(1)(b).

The court entered a final order of child support on September 13, 2002. CP at 1301. It held Mr. Bernhardt in contempt, on February 7, 2003, for his failure to pay the support obligations due under the final order of child support: postsecondary educational support and extraordinary health care expenses. Mr. Bernhardt was required to pay 79 percent of the parents' share of the oldest child's postsecondary educational support expenses and 79 percent of the extraordinary health care expenses. The child support order capped the postsecondary educational support expenses at an amount equal to the costs required to attend a Washington State public institution.

Mr. Bernhardt argues that the court abused its discretion when it concluded that he "intentionally disobeyed" the order of child support. Appellant's Br. at 49. He argues that he tried to get information regarding college costs from his son. He also argues that his failure to pay the extraordinary health care bills was an oversight since Ms. Turksel did not forward him the bills.

The court found differently:

> Mr. Bernhardt did not lift a finger to find out what his post-secondary support obligation was, assuming that it was limited by the "state cap" that he believed was included. . . . Mr. Bernhardt did not, but should have, examined the University of Washington Website or otherwise contacted the University to find out what the annual student budget was and make the further calculations . . . to determine his obligation. . . . The Order of Child Support was entered on September 13, 2002 . . . . This implied that he should have paid this obligation sometime in September or October 2002 when the initial tuition was due to Willamette University and thereafter when the second semester tuition was due, presumptively in January 2003. He failed to do any of these.

CP at 1499.

The court also found that Mr. Bernhardt was ordered to pay $1,590 for orthodontist expenses on August 23, 2001. And his obligation was "confirmed by the subsequent September 13, 2002 Order of Child Support." *Id.* at 1500. "[H]e has apparently paid $400.00 and no more. Subsequently, [Ms. Turksel] has paid $1,475.48 in payments of $200.00 and $1,275.48 to pay off the remaining balance that Damon & Magnuson [orthodontist] claimed was due after [she] had paid her share of the obligations." *Id.* The court further found that Mr. Bernhardt "presented some evidence" that he paid Ms. Turksel the amount owed. *Id.* Ms. Turksel presented evidence that she had "not yet received the payment that [Mr. Bernhardt] claims he made" (as of the date of the hearing). *Id.*

The court did not abuse its discretion when it entered an order for contempt.

Moreman, 126 Wn.2d at 40. The final order for child support was entered on September 13, 2002. The contempt order was entered on February 7, 2003. Mr. Bernhardt had not yet paid his portion of the postsecondary educational support expenses. Mr. Bernhardt's payment for the extraordinary health care expenses was not received (as of the date of the hearing). The court ordered Mr. Bernhardt to make payments for the extraordinary health care expenses in August 2001.

$8,000 Attorney Fees on Appeal

We review an award of attorney fees for an abuse of discretion. *In re Marriage of Moody*, 137 Wn.2d 979, 994, 976 P.2d 1240 (1999). We review questions of law de novo. *City of Yakima v. Mollett*, 115 Wn. App. 604, 607, 63 P.3d 177 (2003).

A trial court has the authority to award reasonable attorney fees for an appeal from the modification of a decree imposing child support and a parenting plan. RAP 7.2(a), (d); RCW 26.09.140. This authority extends even "[a]fter review is accepted by the appellate court." RAP 7.2(a), (d). A trial court cannot, however, award fees if an appellate court previously denied the request. *State ex rel. A.N.C. v. Grenley*, 91 Wn. App. 919, 929, 959 P.2d 1130 (1998).

A trial court must award attorney fees in accordance with RCW 26.09.140. RCW 26.09.140 does not require that the moving party prevail on appeal. *In re Marriage of*

Rideout, 150 Wn.2d 337, 357, 77 P.3d 1174 (2003). Fees are awarded based on the parties' financial circumstances. RCW 26.09.140; *Rideout*, 150 Wn.2d at 357.

An award of fees is appropriate if it balances the financial need of the moving party against the ability of the other party to pay. *Moody*, 137 Wn.2d at 994. Financial need is, however, irrelevant if the court finds that the nonmoving party acted with intransigence. *In re Marriage of Foley*, 84 Wn. App. 839, 846, 930 P.2d 929 (1997). "Intransigence is the quality or state of being uncompromising." *In re Marriage of Schumacher*, 100 Wn. App. 208, 216, 997 P.2d 399 (2000).

Ms. Turksel requested attorney fees as part of her motion on the merits (filed with this court). Our commissioner denied the motion: "[I]n view of the voluminous record in this case, judicial economy is best served by having a panel of the Court decide the case." *In re Marriage of Turksel*, No. 21808-2-III Commr's Ruling (Wash. Ct. App. Sept. 7, 2004). Ms. Turksel then filed a motion for attorney fees (for the appeal) in the trial court. She did not file a financial declaration. The court heard the matter. It "denied [her motion] without prejudice and [ordered that] she may renew the motion with a proper showing regarding her financial need." CP at 1949; RP (Nov. 15, 2004) at 7.

Ms. Turksel filed another motion for attorney fees (for the appeal) in the trial court on January 3, 2005. She filed the necessary financial declaration and a

copy of her financial records on January 3. The court heard the matter on January 18. The court concluded it could award fees despite this court's denial of fees because we "did not make a substantive decision on [Ms. Turksel's] Motion on the Merits or her request for attorney's fees[.] That decision was procedural only[.] It was based on the size of the file and . . . for reasons of judicial efficiency." CP at 2066. The trial court also found that Mr. Bernhardt was voluntarily unemployed. *Id.* at 2067. "[H]e was not involuntarily terminated from his [employment] position." *Id.*

The court further found that Ms. Turksel's reasonable attorney fees on appeal, at that time, were $23,000. It found that Ms. Turksel "should pay some of those fees based on her ability to pay." *Id.* at 2068. It concluded that Mr. Bernhardt "should pay $8,000.00 of [Ms. Turksel's] attorney's fees on appeal" based on the parties' financial circumstances.

Mr. Bernhardt's argument raises three questions: (1) whether the trial court can hear a motion for attorney fees on appeal while the appeal is pending; (2) whether the trial court was required to deny Ms. Turksel's request for attorney fees based on the timeliness of her financial declaration; and (3) whether the parties' financial situations precluded any fee shifting.

Mr. Bernhardt's first argument is answered by RAP 7.2(a), (d). The trial

court does have authority to award attorney fees on appeal while the appeal is pending. RAP 7.2(a), (d); RCW 26.09.140. Second, Ms. Turksel timely filed a financial declaration with her renewed motion for attorney fees. Mr. Bernhardt's argument appears to be directed at the court's previous ruling on attorney fees when it denied Ms. Turksel's request without prejudice and allowed her to renew her motion upon a proper showing of financial need. It has authority to do that. *Moody*, 137 Wn.2d at 994. Finally, the time limit imposed by RAP 18.1(c) does not apply here, since Ms. Turksel moved for the award of fees in the trial court. And she had the right to do this. RAP 7.2(a), (d).

Finally, the court had authority to order Mr. Bernhardt to pay a portion of Ms. Turksel's attorney fees. *Moody*, 137 Wn.2d at 994. It concluded that Mr. Bernhardt was voluntarily unemployed. And its findings reflect that it considered the appropriate financial circumstances, including ability to pay and the need for fees. We find no abuse of discretion.

Recusal of Judge Baker

We review the trial judge's failure to recuse herself for an abuse of discretion. *In re Marriage of Farr*, 87 Wn. App. 177, 188, 940 P.2d 679 (1997).

A party may move to recuse a judge pursuant to RCW 4.12.040 and .050. The moving party must file both a motion for recusal and an affidavit of prejudice before the

judge makes any rulings in the case. RCW 4.12.050. If the party moves to recuse the judge after a ruling has already been made, he must "*demonstrate prejudice* on the judge's part." *Farr*, 87 Wn. App. at 188 (emphasis added). Prejudice is not presumed. *Rich v. Starczewski*, 29 Wn. App. 244, 246, 628 P.2d 831 (1981).

A judge must also *appear* to be impartial. *Brister v. Council of City of Tacoma*, 27 Wn. App. 474, 486, 619 P.2d 982 (1980). A showing of *potential* bias is sufficient to raise concerns under the "appearance of fairness doctrine." *State v. Dominguez*, 81 Wn. App. 325, 329-30, 914 P.2d 141 (1996). "The critical concern in determining whether a proceeding appears to be fair is how it would appear to a reasonably prudent and disinterested person." *Brister*, 27 Wn. App. at 486-87.

Ms. Turksel moved for an award of attorney fees on appeal while the appeal was still pending. The motion was set before superior court Judge Rebecca Baker. Judge Baker had entered the child support order and the parenting plan. Both were appealed. Mr. Bernhardt moved to recuse Judge Baker for actual prejudice. He also moved to recuse her under the "appearance of fairness doctrine." CP at 1823. Judge Baker denied his motion.

Mr. Bernhardt argues that "both RCW 4.12.040 and the appearance of fairness doctrine required . . . Judge Baker to recuse herself." Appellant's Br. at 15. He argues that she was prejudiced against him. He also argues that she should not have been

allowed to rule on the motion for attorney fees since it addressed an appeal of her decision.

Mr. Bernhardt cites two specific reasons to support his belief that Judge Baker was prejudiced against him: (1) "Judge Baker expressed a belief as to Mr. Bernhardt's lack of credibility in a letter ruling"; and (2) "Also, Judge Baker found that Ms. Turksel[] was not voluntarily under-employed." Appellant's Br. at 20. Neither of these reasons shows actual or potential bias or prejudice. *Farr*, 87 Wn. App. at 188; *Starczewski*, 29 Wn. App. at 246. The question before the court was need and ability, not the merits of any appeal and the judge recognized this: "We're talking purely here [about] need and ability to pay at this juncture, not merits or recalcitrance or any of that. We're talking about the need and ability to pay. So what should Mr. Bernhardt pay, based on his ability to pay compared to Ms. Turksel[]'s?" RP (Jan. 18, 2005) at 23.

Judge Baker did not abuse her discretion when she denied his motion for recusal. *Farr*, 87 Wn. App. at 188.

Attorney Fees and Costs on Appeal

We may award attorney fees and costs on appeal. RAP 18.1; RCW 26.18.160. We may also sanction a party who files a frivolous appeal. RAP 18.9.

A party must devote a section of his or her brief to a request for attorney fees and costs. RAP 18.1(b). "Argument and citation to authority are required." *Wilson Court*

Ltd. P'ship v. Tony Maroni's, Inc., 134 Wn.2d 692, 710 n.4, 952 P.2d 590 (1998); *In re Marriage of Hoseth*, 115 Wn. App. 563, 575, 63 P.3d 164 (2003).

Ms. Turksel argues she is entitled to an award of attorney fees and costs under RAP 18.1, RCW 26.18.160, and RCW 26.09.160. RCW 26.18.160 applies to an action to enforce a support order under chapter 26.18 RCW. RCW 26.09.160 applies to an action for contempt for the failure "*in either the negotiation or the performance of a parenting plan*" to comply with a parenting plan or the child support order. RCW 26.09.160(1)[2] (one parent may not fail to comply simply because the other parent failed to comply) (emphasis added). Ms. Turksel also argues she is entitled to fees under RAP 18.9 "in responding to Mr. Bernhardt's frivolous arguments." Resp't's Br. at 45.

This appeal encompasses a challenge to several orders: final (modified) parenting plan, final (modified) child support order, contempt order, and a wage assignment order.

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[2] RCW 26.09.160(1) states:

"The performance of parental functions and the duty to provide child support are distinct responsibilities in the care of a child. If a party fails to comply with a provision of a decree or temporary order of injunction, the obligation of the other party to make payments for support or maintenance or to permit contact with children is not suspended. *An attempt by a parent, in either the negotiation or the performance of a parenting plan*, to condition one aspect of the parenting plan upon another, to condition payment of child support upon an aspect of the parenting plan, *to refuse to pay ordered child support*, to refuse to perform the duties provided in the parenting plan, or to hinder the performance by the other parent of duties provided in the parenting plan, shall be deemed bad faith and shall be punished by the court by holding the party in contempt of court and by awarding to the aggrieved party reasonable attorneys' fees and costs incidental in bringing a motion for contempt of court." (Emphasis added.)

CP at 1301, 1494, 1498, 1510, 1521. The contempt and wage assignment orders were entered under chapter 26.18 RCW. RCW 26.18.050, .070; CP at 1498-1513. The appeal did not involve an order for contempt under RCW 26.09.160.

Ms. Turksel is entitled to an award of reasonable attorney fees and costs for the portion of the appeal that addressed the enforcement of the contempt and wage assignment orders. RCW 26.18.160. She is not entitled to fees and costs for the portion of the appeal that addressed the modification orders. *Id.*; *In re Marriage of Oblizalo*, 54 Wn. App. 800, 805-06, 776 P.2d 166 (1989). She is also not entitled to fees under RAP 18.9 or RCW 26.09.160. Mr. Bernhardt was not held in contempt under RCW 26.09.160 (relating to the parenting plan) and he did not file a frivolous appeal. RAP 18.9; RCW 26.09.160.

We affirm the trial court's award for postsecondary educational expenses and Mr. Bernhardt's proportional share of postsecondary educational and extraordinary health care expenses. We also affirm the trial court's determination that Ms. Turksel was not voluntarily underemployed. We affirm its decision to enter the wage assignment and contempt orders, the award for $8,000 in attorney fees on appeal, and its denial to recuse Judge Baker. We remand for factual findings and/or a revision in the order for the court's deviation from the standard support guidelines for basic child support and the court's award of total child support in excess of 45 percent of Mr. Bernhardt's net income.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

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Sweeney, C.J.

WE CONCUR:

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Brown, J.

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Kulik, J.